BEP AKITEK PTE.

v.

PONTIAC HOTEL PTE. LTD.

HIGH COURT, SINGAPORE
M KARTHIGESU J
[SUIT NO. 5326 OF 1983]
29 NOVEMBER 1990

CIVIL PROCEDURE: *Amendment to counterclaim - Raising new claim which is statute barred - Whether from date on which amendment was made or date on which action commences.*

The plaintiffs, BEP who call themselves consultant architects for the defendant P's project (the Regent Singapore), are claiming for the balance of their professional fees. P counterclaimed on the basis of breaches of contract and negligence. A trial date was fixed. Subsequently, P on 25 October 1989 applied to amend their defence and counterclaim to include a claim which was statute barred. The learned Assistant Registrar granted leave for the plaintiff's application and ordered that the amendments were to take effect from 25 October 1989. P appeals against the latter part of the order.

The issue here is whether the granting of leave to amend a counterclaim by raising a new claim which is statute barred should have been granted on terms that the amendment becomes effective only on the date on which the application to amend was made, thereby nullifying the defendant's new claim and giving BEP the defence of a statute bar to that claim which BEP did not have when they commenced their action against P.

Observations on O. 20 r. 5 of the Rules of the Supreme Court 1970 which were in *pari materia* with the English and s. 31 of the Limitation Act (the Act) O. 20 r. 5.

Held:

[1] Section 31 of the Act overrides any discretion given to the Court by the words "on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct" appearing in O. 20 r. 5(1), the Act deems a counterclaim which raises a new claim which is statute barred to have commenced on the same date as the action in which the counterclaim is pleaded.

[2] An Act of Parliament overrides a practice rule, the learned Assistant Registrar in ordering the defendant's amendment to the counterclaim to take effect from 25 October 1989 exercised a discretion he did not have.

[Defendant's appeal allowed.]

Cases referred to:

Brickfield Properties Ltd. v. Newton [1971] 3 All ER 328
Weldon v. Neal [1887] 19 QBD 394
Chatsworth Investments Ltd. v. Cussins (Contractors) Ltd. [1969] 1 All ER 143
Ketteman & Ors. v. Hansel Properties Ltd & Ors. [1987] 2 WLR 312
Liff v. Peasley & Anor. [1980] 1 ELR 781
Liverpool Roman Catholic Archdiocesan Trustees Inc. v. Gibberd & Ors 7 Con LR 113
Liptons Cash Registers and Business Equipment Ltd. v. Hugin (GB) Ltd. & Ors. [1982] 1 All ER 595

Legislation referred to:
Limitation Act 1939 [UK], s. 28
Limitation Act 1980 [UK], s. 35(1), (2)
Limitation Act (Cap 163) [Sing], s. 31
Rules of the Supreme Court 1970 [Sing], O. 20 r. 5

Other sources referred to:
Halsbury's Statutes Vol. 13, at p. 1190
1991 Supreme Court Practice, para. 20/5-8/2

For the defendants/appellants - Tang Khin Wai
For the plaintiffs/respondents - Jimmy Yap

JUDGMENT

M Karthigesu J:

This appeal raises an interesting and not unimportant procedural question. It is whether the granting of leave to amend a counterclaim, by raising a new claim which is statute barred, should have been granted on terms that the amendment became effective only on the date on which the application to amend was made, thereby nullifying the defendants' new claim and giving the plaintiffs the defence of a statute bar to that claim which the plaintiffs did not have when they commenced their action against the defendants.

The plaintiffs describing themselves as consultant architects for the defendants' project now completed and known as the Pavilion Intercontinental (now the Regent Singapore) claimed under an agreement contained in or evidenced by the defendants' letter to the plaintiffs dated 17 May 1978 the balance of their professional fees in the sum of $415,893 by a specially indorsed writ of summons issued on 22 October 1983. On 19 March 1984 following an application for summary judgment the plaintiffs were given leave to enter judgment for $47,200, liability for which was admitted by the defendants, together with interests thereon at 8% per annum from February 1983 until 19 March 1984, but execution was stayed pending the trial of the defendants' counterclaim. The defendants were given unconditional leave to defend the remainder of the plaintiffs' claim in the sum of $368,693. The plaintiffs duly entered judgment on 2 April 1984.

On 4 April 1984 the defendants delivered their defence and counterclaim. The defence was that the agreement contained in or evidenced by the defendants' letter to the plaintiffs dated 17 May 1978 had been varied by an oral agreement on or about 11 July 1980 and consequently the fee payable was $1,960,000 and not $2,328,693. Since a sum of $1,912,800 had been paid, which the plaintiffs acknowledged having received, the sum due to the plaintiffs was the sum of $47,200 which the defendants admitted. The counterclaim alleged breaches of contract and negligence and claimed damages therefor. A reply and defence to counterclaim was delivered on 25 April 1984 joining issue with the defendants upon their defence and pleading various defence to the allegations of breaches of contract and negligence.

Notice of trial was duly given and the case set down for hearing on 2 December 1986.

The defendants by an application in chambers before the Registrar dated 25 October 1989 applied to amend their defence and counterclaim, firstly, by withdrawing their admission that the $47,200 was due and payable to the plaintiffs and by pleading by way of a new defence that the plaintiffs were not "registered architects" within the meaning of the Architects Act and were thus prohibited by law from claiming or recovering fees or remuneration for architectural services rendered by the plaintiffs to the defendants. Secondly, by pleading a

new claim by way of a counterclaim for the return of the sum of $1,912,800 as money had and received by the plaintiffs for the use of the defendants on the ground that the sum of $1,912,800, paid over a period from 6 May 1978 to 8 March 1983, was paid in pursuance of an ineffective and/or illegal agreement.

The learned Assistant Registrar who heard the application gave leave to the defendants to amend their defence and counterclaim in the manner stated above and ordered that the amendments took effect from 25 October 1989. The defendants' appeal is limited to that part of the learned Assistant Registrar's order that the amendments should take effect from 25 October 1989.

The relevant provision of the Rules of the Supreme Court 1970 applicable to this application is O. 20 r. 5 and more particulary paras. (1), (2) and (5) which I set out below:

> (1) Subject to O. 15, rr. 6, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.
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> (2) Where an application to the Court for leave to make the amendment mentioned in para. (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so. (Emphasis added)
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> (5) An amendment may be allowed under para. (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment.

Order 20 r. 5 is *in pari materia* with the English O. 20 r. 5.

Provided the condition specified in para. (5) is satisfied there clearly is a discretion in the Court to permit a new claim to be made either by the plaintiff or the defendant by an amendment to the statement of claim or the counterclaim as the case may be. There can be no doubt of that and the plaintiffs having persuaded the learned Assistant Registrar to exercise his discretion in imposing the term of making the amendment to the counterclaim effective from 25 October 1989, regretfully for them, in my view, rest content in having preserved the defence of a statute bar, or so they believe.

The question however is whether the Court has a discretion when a new claim which is statute barred is pleaded by way of an amendment to a counterclaim to order that it takes effect from a date other than the date of commencement of the original action. In my view there is not. Section 31 of the Limitation Act (Cap. 163) provides as follows:

> For the purposes of this Act, any claim by way of set-off or counterclaim shall be deemed to be a separate action and to have been commenced on the same date as the action in which the set-off or counterclaim is pleaded.

Again I must observe that this provision is *in pari materia* with s. 28 of the English Limitation Act 1939. The annotation to this section in *Halsbury's Statutes* Vol. 13 at p. 1190 says this:

> The effect of this section is that if this Act is pleaded to a defence of set-off or a counterclaim, the plaintiff, in order to establish his plea, must prove that the set-off or counterclaim was barred when he himself commenced his action and it is not enough to prove that it was barred at a time when it was pleaded.

In my view s. 31 of the Limitation Act (Cap. 163) over-rides any discretion given to the Court by the words "on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct" appearing in para. (1) of O. 20 r. 5.

I am fortified in this view by a consideration of the debate that has ensued in the English Courts since the introduction of the English O. 20 r. 5 in its present form on 1 January 1964 to replace the then existing practice rule which was O. 28 r. 1 and which provided:

> The Court or a Judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings, in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purposes of determining the real questions in controversy between the parties.

As Edmund Davies LJ observed in *Brickfield Properties Ltd. v. Newton* [1971] 3 All ER 328 at 340:

> No provision, one would have thought, would be more expansive or far-reaching. Yet for many years the Court acted in accordance with the decision in *Weldon v. Neal* [1887] 19 QBD 394 that a plaintiff will not be allowed to amend by setting up fresh claims in respect of causes of action which since the issue of the writ have become barred by a Statute of Limitations.

Thus O. 20 r. 5 was a liberalising provision and in the words of Lord Denning MR in *Chatsworth Investments Ltd. v. Cussins (Contractors) Ltd.* [1969] 1 All ER 143 at 145 "the new RSC O. 20 r. 5(2), (3), (4) and (5) has specifically over-ruled a series of cases which worked injustice".

The further debate that ensued in the English Courts was whether an amendment duly made under O. 20 r. 5 took effect from the date when the amendment was made or from the date of the original document which it amended. This debate was laid to rest when the House of Lords in *Ketteman & Ors. v. Hansel Properties Ltd. & Ors.* [1987] 2 WLR 312 ruled in favour of the date when the amendment was made thus adopting the "no useful purpose theory" as opposed to the "relation back theory" so eloquently argued by Brandon LJ in his judgment in *Liff v. Peasly & Anor.* [1980] 1 WLR 781.

It is not surprising that almost all the reported cases on this question are cases dealing with a plaintiff's application to amend the statement of claim raising a new claim which was statute barred or the addition of a defendant against whom the claim would have been statute barred. I am not aware of any reported case where the question of when the amendment took effect being discussed in relation to a counterclaim raising a new claim which was statute barred. The reason seems obvious to me. It is because the Limitation Act deems such a claim to have commenced on the same date as the action in which the set-off or counterclaim is pleaded.

In 1980, however, the English Parliament intervened and replaced the English 1939 Limitation Act with the 1980 Act. The current English position is succintly stated in the *1991 Supreme Court Practice* para. 20/5-8/2 as follows:

> On the other hand in actions to which the Limitation Act 1980 applies, the relation back theory of amendment is expressly provided by Statute. By s. 35(1), it is provided that any new claim made in the course of the action will be deemed to be a separate action and except in the case of third party proceedings will be deemed to have been commenced on the same date as the original action and for this purpose s. 35(2) provides that a "new claim" means any claim by way of set-off or counterclaim and any claim involving either (a) the addition or substitution of a new cause of action or (b) the addition or substitution of a new party (see Vol. 2 Limitation Act 1980, para. 6160).

Thus, what applied in the case of new claims introduced by way of amendment to counterclaim under s. 28 of the 1939 Limitation Act now applies to amendments to both statements of claim and counterclaims by reason of s. 35(1) and (2) of the 1980 Act.

Plaintiffs' Counsel referred me to *Liverpool Roman Catholic Archdiocesan Trustees Inc. v. Gibberd & Ors.* referred to in para. 20/5-8/2 of the *Supreme Court Practice* as unreported but which is in fact reported in 7 Con. LR 113, in support of his submission that the Court has a discretion to determine the date when an amendment shall take effect. A better case for him to have referred me to would have been *Liptons Cash Registers and Business Equipment Ltd. v. Hugin (GB) Ltd. & Ors.* [1982] 1 All ER 595. In the former case the Judge acted on his own motion under O. 20 r. 8 to amend the statement of claim and in the latter it was a plaintiff's application to amend the statement of claim. The 1980 Limitation Act did not apply to either of these two cases and it will be noted that in the former case the learned Judge specifically acknowledged that the 1980 Limitation Act did not apply.

In my view these cases are not authority for the proposition that the express provision in the Limitation Act, s. 31, deeming any claim, and this must include a new claim brought about by an amendment to the counterclaim, to have commenced on the same date as the action in which the counterclaim is pleaded can be displaced by the exercise of discretion provided in a practice rule.

An Act of Parliament overrides a practice rule. It cannot be otherwise. This is but a self-evident proposition for which no authority is needed. I therefore rule that the learned Assistant Registrar in ordering the defendant's amendment to the counterclaim to take effect from 25 October 1989 exercised a discretion he did not have.

In the event I allow the defendant's appeal and set aside that part of the learned Assistant Registrar's order dated 26 June 1990 ordering para. 14 of the amended defence and counterclaim to take effect from 25 October 1989. The costs of this appeal will be taxed and paid to the defendants forthwith.

Also found at [1991] 1 CLJ 196